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Nos. 10-238, 10-239

IN THE
Supreme Court of the United States

ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, et al.,
Petitioners,

v.

KEN BENNETT, in his official capacity as Secretary of State of the State of Arizona, et al.,
Respondents.

JOHN MCCOMISH, et al.,
Petitioners,

v.

KEN BENNETT, in his official capacity as Secretary of State of the State of Arizona, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE COMMITTEE FOR ECONOMIC DEVELOPMENT AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

PAUL M. SMITH
Counsel of Record
MICHAEL B. DESANCTIS
KATHERINE A. FALLOW
JAMES C. COX
JENNER & BLOCK LLP
1099 New York Avenue, NW
Suite 900
Washington, DC 20001
(202) 639-6000
psmith@jenner.com

Attorneys for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*[1]

The Committee for Economic Development ("CED") is a nonprofit, nonpartisan, and nonpolitical public policy organization directed by approximately 200 senior corporate executives and university leaders. Since its inception in 1942, its mission has been to engage the leadership of the corporate community to support policies that will promote economic growth. CED is a leading advocate for business interests on issues ranging from health care to corporate governance.

The business leaders who serve as CED's trustees consistently have supported research, analysis, and advocacy regarding the ground rules for political elections. In addition to producing reports and organizing surveys, CED has filed *amicus curiae* briefs in *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003), *Caperton v. A.T. Massey Coal, Inc.*, 129 S. Ct. 2252 (2009), and *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010). CED's involvement stems from the conviction that competitive executive and legislative elections, along with an independent judiciary, further the interests of American business.

In this *amicus curiae* brief, CED seeks to counteract the allegation that public finance triggers, like those in Arizona's Citizens Clean Elections Act,

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

burden corporate and other donors by compelling them to subsidize "competing" speech. Arizona's public finance trigger does not limit the expenditures by private individuals or corporations, nor does it compel their speech. Instead, it encourages *more* speech and *more* political competition, results that are entirely consistent with the First Amendment. CED's trustees believe that the real danger here would be a decision invalidating Arizona's use of triggers, which would harm corporate interests by reducing genuine electoral competition, promoting an "arms race" mentality in electoral fundraising, and restoring the damaging perception of corruption between politicians and businesses that grew out of the AzScam scandal.

Because this issue is critically important to businesses in Arizona and around the country, CED respectfully urges this Court not to disturb the carefully crafted public financing system Arizona has developed based on this Court's prior decisions in this area.

SUMMARY OF ARGUMENT

The interests of the business community are best served not only through robust economic competition but also through open competition in elections for executive and legislative offices. Elections should reflect a capitalist market where the best ideas win, an ideal best realized if more than one candidate can remain truly competitive. The trigger mechanism used in Arizona's Citizens Clean Elections Act, Ariz. Rev. Stat. § 16-940 *et seq.*, promotes competition in public elections by providing a meaningful

opportunity to compete for candidates who opt to receive public campaign financing in lieu of private funding. The result is a welcome increase in speech, not a limitation on speech.

The Act does not limit the speech of any candidate, or discriminate against candidates based on their identity. Nor does it discourage corporations from spending money to express their genuine electoral preferences. To the contrary, the funding trigger counteracts significant concerns about the role of corporations in elections that have only increased since this Court's decision in *Citizens United*. The American business community suffers from the negative perception that corporate spending corrupts the political process. This problem is exacerbated by the prevailing perception that donations are made in furtherance of a company's arms race with competitors to secure political access, rather than to further a genuinely expressive objective. A successful public financing model like Arizona's creates a compelling alternative to this type of arms race.

ARGUMENT

I. ARIZONA'S LAW FOSTERS MORE, NOT LESS, COMPETITION IN THE MARKETPLACE OF IDEAS.

The Citizens Clean Elections Act encourages the development and discussion of new ideas by inviting new voices to engage in the political dialogue in Arizona. In so doing, the Act accomplishes the First Amendment's aspiration to "secure the widest possible dissemination of information from diverse and antagonistic sources." *Buckley v. Valeo*, 424

U.S. 1, 49 (1976). As the Court remarked in *Buckley*, an effort "not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process" furthers First Amendment values that are vital to a self-governing people. *Id.* at 92-93.

A. Competition in Executive and Legislative Elections, Like Competition in the Marketplace, Leads to Better Outcomes.

This Court's First Amendment jurisprudence is rightfully focused on promoting an "'uninhibited marketplace of ideas.'" *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 896 (2010) (quoting *Virginia v. Hicks*, 539 U.S. 113, 119 (2003)). "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail" and in which that marketplace is not monopolized. *See Red Lion Broad. v. Fed. Commc'ns Comm'n*, 395 U.S. 367, 390 (1969). As business leaders, CED's trustees appreciate the importance of an uninhibited marketplace; it is the freedom of the marketplace that drives American ingenuity and success in the business sector.

Competition is the basis of our system of commerce. Competition produces innovation and motivation—it fosters new ideas and advances in technology. It creates wealth. Simply put, business competition is the backbone of our economy. As business leaders, CED's trustees understand that sometimes the free market fails, and the government must step in to ensure competition. Not too long ago,

the Supreme Court explained one such important government regulation—the Sherman Antitrust Act. "The purpose of the Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself." *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993). It is this unique American approach—a free market system where the government works to *promote* competition—that has led to unmatched ingenuity and commerce in our country.

Like any marketplace, the political marketplace must foster competition if it is to thrive. Arizona voters passed the Citizens Clean Elections Act in order to revive its political marketplace by encouraging participation in the political process and thereby decreasing the opportunities for corruption. *See McComish v. Brewer*, 2010 WL 2292213, at *1 (D. Ariz. Jan. 20, 2010). The trigger system fosters political competition and political speech in a uniquely efficient manner. In some races, a public financing system in which a candidate receives only a fixed initial distribution fails to provide a realistic alternative to a privately financed campaign, because the fixed distribution will be too low to allow a publicly financed candidate to compete; in other races, such a system will unnecessarily drain the public treasury by giving candidates who opt in more money than they would need to accomplish the Act's goals. Arizona's public financing trigger avoids this inefficiency through a careful calibration that allows candidates who do not wish to participate in the

public system to spend as much as they want, while at the same time providing a defined and limited amount of additional funding to candidates accepting public financing to ensure that those candidates are not prevented from participating in the political marketplace by an opponent's monopolization of the airwaves.

The reality of our modern political system is that financial resources determine a candidate's ability to communicate a message to the public. But no one has a First Amendment right to have his or her ideas unchallenged. Our political discourse must be an "open marketplace." *Citizens United*, 130 S. Ct. at 884. When only one candidate has sufficient financial resources to transmit his or her message broadly, there can be no open marketplace. As they are in the business markets, monopolies are a cancer on political markets. The trigger mechanism provided by the Citizens Clean Elections Act responds in a narrowly drawn way to this problem, consistent with the core goal of the First Amendment. From a corporate perspective, such an agile and cost-effective mechanism is an obviously sound approach. By placing no limit on one's ability to spend, the law fosters competition while encouraging more speech about competing ideas and policies.

B. The Act Allows Merit, Not Money, to Determine Outcomes by Increasing Political Speech Overall.

Public finance laws enable a wider array of individuals to enter into, and compete in, executive

and legislative elections and the open political dialogue surrounding them. Individuals who would be limited by comparatively low personal wealth, or relatively small donor networks, are able to become viable candidates, reaching many more voters with their message than they could without the aid of public financing. *See* L. SANDY MAISEL, RETHINKING POLITICAL REFORM: BEYOND SPENDING AND TERM LIMITS 37 (1994) (finding that financial obstacles are "the key factor" limiting potential candidates' entry decisions); Janet M. Box-Steffensmeier, *A Dynamic Analysis of the Role of War Chests in Campaign Strategy*, 40 AM. J. POL. SCI. 352 (1996) (presenting evidence that incumbent campaign "war chests" deter quality candidates from running against incumbents). In Arizona, it is working: more candidates have entered political races there since the advent of public funding. In 2006, there were 14 percent more House candidates and 16 percent more Senate candidates than there were in 1998, the last election before the Act went into effect. MEGAN MOORE, NATIONAL INSTITUTE ON MONEY IN STATE POLITICS, CLEAN ELECTIONS, ARIZONA 2006 2 (2008), *available at* http://www.followthemoney.org/press/ReportView.phtml?r=371&ext=1.

Furthermore, even candidates with the ability to run viable privately funded campaigns may opt into public funding programs in order to free themselves from the pressure to tailor their messages to what donors and prospective donors want to hear. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-390, CAMPAIGN FINANCE REFORM: EXPERIENCES OF TWO STATES THAT OFFERED FULL PUBLIC FUNDING FOR POLITICAL CANDIDATES 27 (2010) (citing, among the

most common reasons candidates stated for participating in public financing program, "You did not want to feel obligated to special interest groups or lobbyists," "Receiving public funds allowed you to spend more time discussing issues," and "You believe the public financing program promotes the accountability of legislators to the public."). The percentage of legislative candidates participating in Arizona's public financing system has steadily increased since the Act's passage, from 26 percent in general elections in 2000 to 64 percent in 2008. *Id.* at 26. Whatever the purpose for opting into a public finance program, the result is more, rather than less, speech.

Arizona's Citizens Clean Elections Act provides those candidates choosing to opt into the public financing system a more meaningful opportunity to compete in the political arena than they would otherwise have. Campaign spending is on the rise in Arizona, as it is across the country. Danielle Kurtzleben, "2010 Set Campaign Spending Records," U.S. NEWS & WORLD REPORT, Jan. 7, 2011. Even after the implementation of the Citizens Clean Elections Act, total campaign spending has continued to increase. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-390, at 24. By providing publicly financed candidates with additional resources as needed based on the political field, more information becomes available to a broader audience—allowing the merits of each candidate's positions to drive the debate.

As this Court recently noted, the ability to speak freely "is an essential mechanism of democracy, for it is the means to hold officials accountable to the

people." *Citizens United*, 130 S. Ct. at 898. Arizona's public funding trigger system ensures that entrenched public officials—with whose donor networks few could compete—are subject to competitive races and thus ultimately held accountable for their policy decisions and political stands. Incumbents generally enjoy a large advantage in campaign fundraising due to established fundraising and communication networks, and as such tend to be capable of outspending their opponents by substantial margins. This combination is a nearly impossible barrier for political challengers to overcome. In the 2007-2008 state legislative election cycle, for example, incumbents across the country enjoyed a 94 percent success rate; candidates who enjoyed the dual advantages of incumbency and fundraising dominance produced a success rate of 96 percent. PETER QUIST, NATIONAL INSTITUTE ON MONEY IN STATE POLITICS, THE ROLE OF MONEY AND INCUMBENCY IN 2007-2008 STATE ELECTIONS (2010), *available at* http://www.followthemoney.org/press/ReportView.phtml?r=423.

Publicly financed challengers in Arizona, on the other hand, have won between 23 percent and 40 percent of legislative elections in each election year since 2000. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-390, at 30. That is because an effective public financing regime significantly mitigates incumbency advantages by reducing barriers to challenger entry and therefore promoting genuine competition among ideas and among candidates. *See generally* ROBERT K. GOIDEL ET AL., MONEY MATTERS: CONSEQUENCES OF CAMPAIGN FINANCE REFORM IN

U.S. HOUSE ELECTIONS 70-71, 74-76 (1999); *see also* Candice J. Nelson, *Money Matters*, 95 AM. POL. SCI. REV. 213, 213 (2001) (book review) (noting that simulations by Gudel and his co-authors establish "that some form of public funding," including "through matching funds," "would help candidates of the minority party, except at the very lowest levels of funding"). Thus, the Act serves the First Amendment's fundamental purpose of public official accountability by providing a meaningful opportunity for new political voices and ideas to penetrate the dialogue.

II. ARIZONA'S LAW SERVES A COMPELLING ANTI-CORRUPTION PURPOSE.

Beyond promoting open elections and the open exchange of ideas, the Act also provides an important constraint on real and perceived corruption. As this Court recognized in *McConnell*, "many corporate contributions [are] motivated by a desire for access to candidates and a fear of being placed at a disadvantage in the legislative process relative to other contributors, rather than by ideological support for the candidates and parties." 540 U.S. at 124-25. In order to remain competitive in the marketplace, business leaders are forced into a veritable arms race of political spending. That arms race harms business in two ways. Directly, the pressure to donate drains corporate treasuries to fund candidates they may or may not support. Indirectly, the perceived *quid pro quo* with politicians damages corporate standing among the American people. Arizona's law supports corporate interests, and the public interest, by

breaking the pernicious cycle of reliance on private funding.

A. The Act Reduces Corporations' Incentive to Fund Candidates to Obtain Political Access.

In order to ensure access regardless of the political climate, corporations must contribute to both parties. The competitive need to maintain access to and avoid retribution from elected officials of both parties forces businesses to allocate valuable resources toward the political process. Such coercion is inconsistent with the genuine expression of ideas, and reinforces the perception—and often the unfortunate reality—that corporate donations are themselves ultimately business transactions. In this environment, corporate campaign donations amount to nothing more than an admission fee.

Politicians openly acknowledge the connection between money and access. Senator Carl Levin (D-Mich.) states: "The parties advertise access. It's blatant. Both parties do it." 147 CONG. REC. 53,248 (Apr. 2, 2001). To ensure access regardless of the political climate, corporations must contribute to both parties. In the 2000 election cycle, 35 of the 50 largest soft-money donors gave to both parties, and 28 of the 50 gave more than $100,000 to both parties. *See McConnell*, 540 U.S. at 124 n.12. Another notable trend is how corporate political spending tracks changes in the partisan makeup of legislatures. For example, in 2006, business PACs gave sixty six percent of their political donations to Republicans. *See* Richard S. Dunham, *As Power*

Shifts, So Do the Dollars, BUSINESSWEEK, Apr. 23, 2007. But Democrats gained control of Congress that year, and during the next campaign cycle, for the first time in two decades, corporate political donations were split evenly between the parties. *See Writing Cheques, Hedging Bets: A Surge in Corporate Money for the Democrats*, THE ECONOMIST, Sept. 18, 2008. "Darrell West, a vice-president of the Brookings Institution, a think tank, says that because many corporations anticipate a victory for Mr. Obama, they consider their gifts to Democrats an investment in their company's future." *Id.*

As the *McConnell* Court recognized, this pattern is inconsistent with the genuine expression of ideas. The record in *McConnell* was replete with examples of cash for access. *See, e.g., McConnell v. Fed. Election Comm'n*, 251 F. Supp. 2d 176, 555-60 (D.D.C. 2003), *aff'd in part*, 540 U.S. 93 (2003); Declaration of Gerald Greenwald, Chairman Emeritus of United Airlines and CED trustee, ¶ 12, *McConnell*, 540 U.S. 93 (No. 02-1674) ("Greenwald Decl.") ("[B]usiness leaders believe—based on experience and with good reason—that . . . access [to politicians] gives them an opportunity to shape and affect governmental decision."); Press Release, CED, *Senior Business Executives Back Campaign Finance Reform* (Oct. 18, 2000) (showing that 75% of business leaders believe political contributions give them an advantage in shaping legislation).

The *McConnell* record also showed the danger of retribution for corporations that do not participate. One Fortune 500 lobbyist described corporate spending on political campaigns in one simple word:

"protection." Burt Solomon, *Forever Unclean*, NAT'L J., Mar. 18, 2000, at 858 ("If you decline to give, you're taking a risk of legislative retribution . . . . Companies are scared that on some critical issue, they'll get hosed. It'll happen quickly, in the dead of night."). This Court also approvingly quoted Mr. Greenwald's statement that "[b]usiness and labor leaders believe, based on their experience, that disappointed Members, and their party colleagues, may shun or disfavor them because they have not contributed." *McConnell*, 540 U.S. at 125 n.13 (quoting Greenwald Decl.).

The relationship between contributions and political access has had a profound effect on how corporations view political contributions. A recent poll of 301 business opinion leaders confirmed that most believed contributions served a non-ideological function:

> *Which of the following comes closest to your own opinion about why corporate America contributes to political campaigns?*
>
> To gain access to influence the legislative process – 55%
>
> To avoid adverse legislative consequences – 17%
>
> To promote a certain ideological position – 16%

Cheryl Korn, Zogby International, Committee for Economic Development: October Business Leader Study (Oct. 2010) (poll results), *available at*

http://www.ced.org/images/content/issues/moneyinpolitics/2010/zogbypoll2010.pdf, at 8. The volume of corporate political spending proves the point—for-profit organizations would hardly allocate scarce resources without some anticipated return. The history of political corruption in Arizona offers a particularly glaring example of the potential for corruption when political contributions turn into business transactions.

B. The Act Promotes Public Confidence in Both Elections and Corporations.

The perception that corporate donations are made primarily to gain political favor or favoritism undermines the public's faith in their government and in their local and state businesses. In a 2010 Gallup poll, only 12 percent of respondents rated the honesty and ethical standards of state officeholders high or very high. For business executives, that number was only 15 percent. Both groups barely eclipsed the approval rating of car salespeople (seven percent). Gallup Poll, Nov. 19-21, 2010, *available at* http://www.pollingreport.com/values.htm. The record in this case amply demonstrates why. Before the passage of the Act, Arizona citizens experienced a string of political corruption scandals, including the 1991 AzScam controversy that saw legislators stuffing bribes in gym bags and taking quid pro quo donations to support gambling legislation. *McComish*, 611 F.3d 510, 514. Later, then-Governor Symington was forced to resign after being indicted for extorting a pension fund. As the Ninth Circuit

stated below, "the State's interest in eradicating the appearance of *quid pro quo* corruption to restore the electorate's confidence in its system of government is not 'illusory,' it is substantial and compelling." *Id.* at 525 (quoting *Buckley*, 424 U.S. at 26-27). Given the history of *quid pro quo* corruption in Arizona, and the appearance of corruption that noncompetitive, unmatched political donations creates, Arizona had a most compelling interest in enacting public finance triggers.

The pervasive belief that there is a "corporate stranglehold on American Democracy" has only increased since this Court's decision in *Citizens United*. Bob Herbert, "When Democracy Weakens," N.Y. TIMES, Feb. 12, 2011 (*Citizens United* "greatly enhanced the already overwhelming power of corporations in politics. . . . When the game is rigged in your favor, you win."); *see also, e.g.*, "Campaign Finance Reform," BUFFALO NEWS, Feb. 7, 2011 (describing the "infamous *Citizens United* case that made it even easier for unions and corporations to bribe politicians"); "City, Chamber Must Clear Air, Rebuild Trust," ARIZONA REPUBLIC, Feb. 3, 2011 (asserting that increased spending permitted by *Citizens United* has spread "distrust" and "suspicion" between Scottsdale, Arizona residents and the Chamber of Commerce); Ian Lovett & Eric Lichtblau, "Political Retreat Draws Anger," INT'L HERALD TRIB., Feb. 1, 2011 (describing an anti-business protest in which the organizers depicted the target business leaders "as symbols of the 'unbridled corporate power' that they maintain was loosed by a Supreme Court ruling last year . . . .").

American business leaders understand that the perception of corruption hurts their companies' bottom lines. In a recent poll conducted for CED, two-thirds of business leaders said that the lack of transparency and oversight in corporate political activity puts corporations at legal risk and endangers corporate reputations. *See* Committee for Economic Development: October Business Leader Study, at 16. This Court has recognized the importance of combating those problems, and the value of effective public financing systems in doing so: "It cannot be gainsaid that public financing as a means of eliminating the improper influence of large private contributors furthers a significant governmental interest." *Buckley*, 424 U.S. at 96.

Public finance triggers counteract this erosion of public confidence in business. By creating a means to compete without relying on private contributions, such triggers ease both the perception that business interests control the political process and the coercive pressure on corporations to donate. Second, they create a realm free of coercive corporate political donations. The "sleaze ball" perception is bad for the political system, and as leaders of the business community, the CED trustees believe this perception is harmful to American businesses. By fostering competition while permitting unlimited donations outside the public financing program, the triggers in the Arizona law provide a cost-effective way to ensure competitive, free, and fair elections where public confidence in the political system and in corporations is bolstered.

Moreover, when public policy decisions appear to be made on the basis of political contributions,

business planning becomes less effective, leading to a less efficient and productive economy. *See* Committee for Economic Development: October Business Leader Study (poll results) at 8-9 (48% of business leaders state that the level of pressure placed on them to make political contributions has increased since 2008, with 28% saying it has "increased a lot"; 29% describe the amount of money solicited as "excessive" and another 22% say it is "high, but not excessive"). Especially in these economic times, such "high" or "excessive" pressure to contribute is an unwelcome drain on corporate resources.

As past and present executives of some of the nation's largest companies, CED's trustees have direct experience with solicitations for financial support from party leaders, elected officials, and the officials' influential backers. Their experience teaches a simple lesson: without innovative regulatory systems, corporate participation in elections is more transactional than ideological. The trigger component of Arizona's public finance law gives corporations an alternative to a forced pressure to donate. If they truly wish to engage in political speech through campaign donations or independent expenditures, they may do so. But the incentive to coerce corporate political donations is greatly decreased. *Free* speech, *free* of coercion is the ultimate First Amendment goal.

CONCLUSION

For the foregoing reasons, *amicus* urges this Court to affirm the decision of the Ninth Circuit and, in any event, not to restrict the ability of Arizona and other states to adopt practical measures designed to promote both open discourse and competition in executive and legislative elections.

Respectfully submitted,

PAUL M. SMITH
Counsel of Record
MICHAEL B. DESANCTIS
KATHERINE A. FALLOW
JAMES C. COX
JENNER & BLOCK LLP
1099 New York Avenue, NW
Suite 900
Washington, DC 20001
(202) 639-6000
psmith@jenner.com

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Attorneys for Amicus Curiae